

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of

Petition for Expedited Declaratory Ruling or
In the Alternative Retroactive Waiver of
Yodel Technologies, LLC

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CG Docket No. 02-278

**Comments of Consolidated World Travel, Inc. and
Consolidated Travel Holdings Group, Inc.**

Introduction

Consolidated World Travel, Inc. (“CWT”) and Consolidated Travel Holdings Group, Inc. (“CTHG”) (together referred to as “Interested Parties”) submit this Comment to the Federal Communications Commission (“FCC”) in response to its Public Notice requesting comment on the Expedited Declaratory Ruling or In the Alternative Retroactive Waiver filed by Yodel Technologies, LLC (“Yodel”) on September 13, 2019 (the “Yodel Petition”), in the above-referenced docket.¹

The Interested Parties urge the FCC to grant the Yodel Petition and rule that the use of soundboard technology, and similar technologies, does not constitute the use of an artificial or prerecorded voice that delivers a message under the Telephone Consumer Protection Act, 47 U.S.C. § 227, *et seq.* (“TCPA”). The Interested Parties are well positioned to comment on soundboard technology because they are involved in litigation concerning a similar technology which allowed users to select among over 40 audio prompts to engage in dynamic, interactive conversations between two live human beings.² The Interested Parties, like Yodel, relied upon the TCPA’s text, structure, and legislative history and the Federal Trade Commission’s then-controlling opinion that such technology did not run afoul of the Telemarketing Sales Rule’s, 16 C.F.R. § 310 (“TSR”) prohibition on telephone calls that “deliver[] a prerecorded message,” to argue that the technology used by VVT does not run afoul of the TCPA. *See* 2009 WL 10650736 (Sept. 11, 2009) (the “2009 Letter”).

Related Litigation

The proceedings in the CWT Case have been extensive. The court certified a class of Illinois residents (1) who Virtual Voice Technologies Pvt. Ltd. (“VVT”) called from December 29, 2014 through May 20, 2016, to market a cruise aboard the Grand Celebration cruise liner sold

¹ Public Notice, *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Declaratory or Retroactive Waiver Filed by Yodel Technologies*, CG Docket No. 02-278, DA 19-931 (Sept. 19, 2019).

² *Bakov v. Consolidated World Travel*, 1:15-cv-02980 (N.D. Ill.) (“CWT Case”); *Bakov et al v. Consolidated Travel Holdings Group, Inc. et al.*, 0:19-cv-61509-WPD (S.D. Fla.).

by CWT, and (2) who answered such calls.” The parties filed cross-motions for summary judgment, and they are fully briefed, including a surreply.

The telephone calls made by VVT that are at issue in the CWT Case started with a VVT employee clicking on a button to place a telephone call. If the call was answered, he or she engaged in a live, real-time conversation with the other person on the telephone call, selecting from over 40 audio prompts to communicate at a time. If they deemed it necessary, the VVT agent could unmute the system and speak using their own voice. Thus, every call manually dialed by a person using the VVT platform resulted in a conversational two-way discussion – similar to the soundboard technology at issue in the Yodel Petition – the contents of which were variable as the conversation progressed.

The primary question in the CWT Case is whether the telephone calls at issue delivered a message “using . . . a[] prerecorded voice” in violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227 *et seq.* (“TCPA”), specifically sections 227(b)(1)(A) or (B). The parties have engaged in extensive briefing on that question in the Northern District of Illinois, where dueling motions for summary judgment are pending. The stakes are high, with plaintiffs seeking damages that could range between a minimum \$22,398,000.00 and, with possible trebling, a maximum of over \$67 million. While the parties have provided volumes of supporting authorities, legislative history, expert reports, and other materials, there has been no direct guidance from the Federal Communications Commission, the agency charged with interpreting and enforcing the TCPA. That will soon change, thanks to the Yodel Petition.

Soundboard and Similar Technologies

Soundboard technology, like the technology used by VVT, is a tool for facilitating a dynamic, two-way conversation involving two human beings. It involves the use of recorded audio snippets of an actor’s voice to be selected by a live, human agent in real time, allowing for an interactive experience between the caller and the call recipient that is different each time. And, if a user deems it necessary, they may unmute the system and speak using their own voice.

Soundboard calls are not robocalls. Unlike “robocalls,” which are automated, one-way, radio-like broadcasts of a recorded message with no human being on the other end of the line, soundboard calls involve a live agent who operates a soundboard through which he or she speaks to consumers in a real-time, consumer-driven conversation.

A soundboard is a device that facilitates two-way communication. It is used in many contexts, particularly by those with physical disabilities or heavy accents, and it is used by companies to ensure compliance with state and federal laws regulating telemarketing. Soundboard technology requires a human operator or human agent to operate the soundboard at all times, selecting recorded audio snippets to speak with and reply to consumers’ responses in a live telephone call.

The speaker determines the content of the message to respond to individualized consumer responses on the other end of the line, no different than if the speaker were using a script without the technology. In a soundboard call, the speaker listens to and interacts with the consumer in a

live two-way conversation. The technology offers many benefits to consumers and regulators by protecting consumers and ensuring compliance.

Statutory Framework

Congress passed the TCPA in 1991 to protect consumers from invasions of privacy caused by unsolicited telephone calls. In relevant part, the TCPA prohibits “initiat[ing] any telephone call to any residential telephone line using *an artificial or prerecorded voice to deliver a message* without the prior express consent of the called party,” subject to certain narrow exceptions. 47 U.S.C. § 227(b)(1)(B); 47 C.F.R. § 64.1200(a)(3) (emphasis added).

The statutory text does not define the term “prerecorded voice.” But when the statute is viewed in its entirety, the statutory text reveals that the prohibition on the use of a “prerecorded voice” was not intended to apply to the dynamic, person-to-person exchanges that soundboard and the VVT technologies allow. The prohibition against “initiat[ing]” calls and “deliver[ing] a message” shows that the statute is meant to proscribe calls that involve no human interactivity, and instead involved the receiving party having no option but to passively listen to a one-sided, static message. Indeed, the statute’s use of the singular in “deliver a message” is consistent with the view that the statute does not apply to regulate interactive conversations that involve multiple exchanges of information, even if aided by recordings.³ As discussed further below, this view is also consistent with the legislative history and subsequent regulatory enforcement.

It cannot be the case that any use of a “prerecorded voice” in any manner during any telephone call would violate the TCPA. If someone wanted to play for his or her friend, while on a telephone call with them, a recording of a song or audio clip that they liked, that would be unlawful under such a view, and subject that person to TCPA liability. What’s more, a person can now “record” and “send audio messages,” *i.e.*, “voice recordings,” via “text” messaging on their native Apple and Android cellular telephones’ systems and through a host of “apps” used by millions of people (Facebook, Instagram, Snapchat, WhatsApp, and Telegram all offer this feature). *See* Ex. A. This type of messaging is expected to supplant text messaging, leading one major newspaper to claim “Voice Chat Is the Future.”⁴ Such a broad interpretation of the TCPA would subject all of the large number of people who send such messages every single day to liability under the TCPA in the (likely) event they did not obtain the prior express consent of the receiving party.

This hypothetical is quite real, and likely far more common, than the scenario the D.C. Circuit found in *ACA International v. Federal Communications Commission* would lead to absurd results of mass liability under the TCPA and therefore required rejection of the FCC’s “expansive” interpretation of “capacity” in the statutory definition of an ATDS. 885 F.3d 687, 696 (D.C. Cir.

³ The undisputed evidence in the CWT case shows that at least one of the named Plaintiffs engaged in a conversation with a VVT agent using his natural voice. She describes in vivid terms a dynamic conversation that could in no way be construed to be a prerecorded voice. *See, e.g.*, Ex. B (excerpt of plaintiff Kinaya Hewlett’s deposition transcript).

⁴ The Wall Street Journal’s website has a video showing examples of such messages in “*Phone Calls Are Dead. Voice Chat Is the Future.*,” which is available at <https://www.wsj.com/articles/phone-calls-are-dead-voice-chat-is-the-future-1531051200>.

2018). The D.C. Circuit was especially bothered by the FCC's interpretation because it had "the apparent effect of embracing any and all smartphones: the device routinely used by the vast majority of citizens to make calls and send messages (and for many people, the sole phone equipment they own)." *Id.* It was undisputed, the ACA court noted, that "smartphone apps" now enable "[c]alling and texting consumers *en masse*" through one's smartphone, meaning "every smartphone qualifies as an ATDS." *Id.* at 696-97. The D.C. Circuit found this to be an absurd and clearly unintended, "eye-popping sweep" of the ATDS prohibition, especially considering that, "as of the end of 2016, nearly 80% of American adults had become smartphone owners," and not only will that number grow, but, "increasingly, individuals own no phone equipment other than a smartphone." *Id.* at 697-98. The D.C. Circuit provided the following hypothetical example:

Imagine, for instance, that a person wishes to send an invitation for a social gathering to a person she recently met for the first time. If she lacks prior express consent to send the invitation, and if she obtains the acquaintance's cell phone number from a mutual friend, she ostensibly commits a violation of federal law by calling or sending a text message from her smartphone to extend the invitation. And if she sends a group message inviting ten people to the gathering, again without securing prior express consent from any of the recipients, she not only would have infringed the TCPA ten distinct times but would also face a minimum damages recovery against her of \$5,000.

Id. at 697 (internal citation omitted).

The D.C. Circuit labeled such a result "untenable," and thus rejected the FCC's "capacious" interpretation of the TCPA "in a manner that brings within [the TCPA] the most ubiquitous type of phone equipment known, used countless times each day for routine communications by the vast majority of people in the country. It cannot be the case that every uninvited communication from a smartphone infringes federal law, and that nearly every American is a TCPA-violator-in-waiting, if not a violator-in-fact." *Id.* at 698. *See also id.* at 697 ("Those sorts of anomalous outcomes are bottomed in an unreasonable, and impermissible, interpretation of the statute's reach. The TCPA cannot reasonably be read to render every smartphone an ATDS subject to the Act's restrictions, such that every smartphone user violates federal law whenever she makes a call or sends a text message without advance consent.").

The same is true here if soundboard and similar technology is considered a "prerecorded voice" under the TCPA. Subjecting any use of a "prerecorded voice" in any manner during any telephone call, even a two-way, dynamic conversation between two live people, would subject countless persons to liability under the TCPA every single day. Countless people send "audio messages" and "voice recordings" through their smartphones' messaging interfaces or other publicized and widely used "apps," such as recorded voice messages on Facebook, Instagram, Snapchat, WhatsApp, and Telegram, among other "apps," rather than type out every message. Like the hypothetical example in ACA, a "group chat" involving numerous exchanges of recorded voice messages could end up subjecting the participants to thousands of dollars in liability under the TCPA. Clearly, Congress could not have intended the "prerecorded voice" prohibition to apply to millions of smartphone users each day. To paraphrase the D.C. Circuit in ACA, "[t]he TCPA cannot reasonably be read to render every smartphone [voice message] a[] [prerecorded voice]

subject to the Act's restrictions, such that every smartphone user violates federal law whenever she . . . sends a [voice] message without advance consent.” *Id.* at 697.

The Legislative History

The TCPA was enacted in 1991. “The year 1991 was a very different technological era and is now more than twenty years removed from present-day calling and faxing technologies,” not to mention, as discussed above, voice messaging technologies. Becca J. Wahlquist, “*The Juggernaut of TCPA Litigation: The Problems with Uncapped Statutory Damages*,” U.S. Chamber Institute for Legal Reform 8 (Oct. 2013). In enacting the TCPA, Congress was concerned with the number of consumer complaints resulting from the proliferation of telemarketing and “the advent of automatic dialer recorded message players (ADMPs) or automatic dialing and announcing devices (ADADs). These machines automatically dial a telephone number and deliver to the called party an artificial or prerecorded voice message.” S. Rep. No. 102-178, at 2 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968 at 1970. The general prohibition on the use of prerecorded messages was designed specifically to address situations where a recipient picks up the phone and encounters a single, passive, uniform message that plays without allowing for real-time interaction between the recipient and caller, such as to ask questions or request not to be called again:

[I]t is clear that automated telephone calls that deliver an artificial or prerecorded voice message are more of a nuisance and a greater invasion of privacy than calls placed by “live” persons. These automated calls cannot interact with the customer except in preprogrammed ways, do not allow the caller to feel the frustration of the called party, fill an answering machine tape or a voice recording service, and do not disconnect the line even after the customer hangs up the telephone. For all these reasons, it is legitimate and consistent with the constitution to impose greater restrictions on automated calls than on calls placed by “live” persons.

Id. at 4-5.

The legislative history is replete with references to the prerecorded voice/message prohibition being based on the lack of having a conversation with someone on the other side who can respond to questions or frustration, and instead receiving a static, one-sided message. *See, e.g., id.* at 13 (“Mr. Steve Hamm, Administrator of the South Carolina Department of Consumer Affairs, testified that “[O]ne of the constant refrains that I hear . . . from consumers and business leaders who have gotten these kinds of computerized calls is they wish they had the ability to slam the telephone down on a live human being so that that organization would actually understand how angry and frustrated these kinds of calls make citizens, and slamming a phone down on a computer just does not have the same sense of release.”); 137 Cong. Rec. S18785-01, S18786 (Nov. 27, 1991) (“Autodialers have grown in use because, as a New York Times story put it, ‘they don’t eat, they don’t sleep and their feelings never get hurt when people curse them or hang up on them. They just call and call and call—each one up to 1,500 times a day.’”); 137 Cong. Rec. H11307-01, H11312 (Nov. 26, 1991) (“[R]obotic calls by machines such as autodialers and computer-generated voices to be a much greater threat to the privacy of our homes than calls by live operators. At least you

can vent your anger to a real person if they have interrupted your dinner. You can ask them questions and hold them accountable to some extent.”).⁵

Thus, as the Sixth Circuit put it following its review of the legislative history, “Congress drew an explicit distinction between ‘automated telephone calls that deliver an artificial or prerecorded voice message’ on the one hand and ‘calls placed by ‘live’ persons’ on the other.” *Ashland Hosp. Corp. v. Serv. Employees Int’l Union, Dist. 1199 WV/KY/OH*, 708 F.3d 737, 743 (6th Cir. 2013). The Sixth Circuit found that the TCPA was “intended to regulate automated calls playing prerecorded messages.” *Id.* Soundboard technology bears *none* of the indicia that Congress and regulatory agencies identified as the subjects of regulation and prohibition under the TCPA. Soundboard calls are not “robocalls” that were the scourge that Congress sought to eliminate. Soundboard technology, and the technology used by VVT, does not deliver a single, static, one-sided prerecorded voice message, but instead uses voice assisted prompts to enable a live human being to have a dynamic, interactive conversation with another person on the other end of the telephone.⁶

The Commission has previously instructed that “[h]ow the human intervention element applies to a particular piece of equipment is specific to each individual piece of equipment, based on how the equipment functions and depends on human intervention, and is therefore a case-by-case determination.” *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 F.C.C. Rcd. 7961 (2015). Soundboard technology employs significant human intervention, and any characterization of soundboard calls as “robocalls” is inapt. Users incur the cost of actually hiring human beings to place and conduct telephone calls – they are not made by a machine or “robot.” Users engaged in real time, live conversations that vary based on the called party’s responses and statements from start to finish.

If soundboard technology was considered to be artificial or prerecorded voice under the TCPA, then, in addition to the examples above, liability would extend to a host of everyday communications (especially when applied to calls to cellular telephones) that could hardly be consistent with Congress’s intent in enacting the TCPA, such as, for example:

⁵ Similarly, the Federal Trade Commission, in its implementation of regulations regarding the use of prerecorded messages under the TSR, observed that “prerecorded calls are by their very nature one-sided conversations, and if there is no opportunity for consumers to ask questions, offers may not be sufficiently clear for consumers to make informed choices before pressing a button or saying yes to make a purchase.” 73 FR 51164-01, 51167 (Aug. 29, 2008).

⁶ The Interested Parties’ position is also consistent with the 2009 Letter, the only regulatory guidance on the topic, which was controlling during the time period relevant to the CWT Case. On September 11, 2009 Lois Greisman, Associated Director of the Division of Marketing Practices of the Federal Trade Commission, commented in a letter to Mr. Michael Bills, CEO of Call Assistant, LLC in response to his petition that the soundboard technology did not constitute the delivery of a “prerecorded message.” In relevant part, Ms. Greisman wrote, “*Consequently, in Staff’s view, the concerns about prerecorded messages addressed in the 2008 TSR amendments do not apply to the calls described above, in which a live human being continuously interacts with the recipient of a call in a two-way conversation, but is permitted to respond by selecting recorded statements.*”

- a person unable to speak without the assistance of a computerized voice, such as the late Stephen Hawking, would be violating the “artificial voice” prohibition;
- a teenager who plays a recording of a new song he or she really likes to their friend on the phone;
- a call made where the caller puts on, and talks through, a mask that alters their voice (for example, a Darth Vader mask);⁷
- a message sent with a recorded voice, whether through the native Apple or Google Android platform or through one of many smartphone “apps” such as Facebook, Instagram, WhatsApp, etc., used by millions of people daily;
- a telephone call from a company where, before the caller starts speaking, a recorded message plays that says, “please be advised this call may be recorded for quality assurance purposes” or the like; or
- a telephone call where the called recipient is placed on hold and a recording plays, whether a song or a message as banal as “thank you for your patience, we will be right back with you.”

Congress could not have intended such a result.

Conclusion

For the foregoing reasons, the Interested Parties respectfully request that the FCC grant Yodel’s Petition and provide relief for similarly situated companies, holding that 47 U.S.C. § 227(b)(1)(B) does not apply to soundboard technology and the similar technology used by VVT in the CWT and CTHG Cases. Alternatively, the Interested Parties request that the FCC exempt all soundboard and VVT calls from penalties under the TCPA from the date that the 2009 Letter was released until the date that it was retracted, May 12, 2017.

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⁷ There is even a well-known movie product tie-in that, if it or any similar recording and playback device is used over the phone (as depicted in the movie), especially a call to a cellular telephone, would violate Plaintiffs’ expansive interpretation of “prerecorded voice” and lead to liability. See *Home Alone 2: Lost in New York* (Hughes Entertainment 1992). Relevant scene available at <https://youtu.be/IgUQHVIH9QU>; Sonia Reyes, *Talkboy: ‘Home Alone 2’ Toy Is Hot, Hot, Hot*, N.Y. Daily News, Dec. 16, 1993 (available at <http://community.seattletimes.nwsources.com/archive/?date=19931216&slug=1737234>).

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